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In the Supreme Court of The United States

OCTOBER TERM 1941

ODELL WALLER,
Petitioner

vs.

RICE M. YOUELL, Superintendent of the Virginia State Penitentiary,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

There are aspects of this case apart from the manifest correctness of the judgment below as a matter of law which impel the Attorney General of Virginia to insist that petitioner's contentions should not be held to present a substantial Federal question; that the imaginary racial and economic issues which petitioner seeks to raise should not be magnified or any color of reality

attributed to them by the granting of certiorari from this Court.

It cannot be overlooked that propaganda of internal dissension and the activation of latent prejudices are among the most powerful weapons available to enemies of the United States. They could ask nothing more than for this Court to countenance an attenuated theory of economic and racial persecution in a case where no such issue is actually involved, and to invite agitation of similar inflammatory controversies in hundreds of other cases throughout the nation. These considerations are particularly vital in view of the notoriety given this case through organized publicity of the most vicious and deceptive nature, of which the court has judicial knowledge from newspaper reports describing, among other things, the deluge of telegrams sent to the Governor of Virginia on petitioner's behalf from all parts of the United States, protesting even that petitioner killed in self-defense, or otherwise exhibiting grotesque misinformation as to the nature of the case.

Unquestionably the granting of certiorari by this Court would imply that there is some foundation for petitioner's absurd theory that he is the victim of discriminatory laws and practices arising out of a conflict between economic classes, to the infinite detriment of public confidence in our government, when in fact neither the alleged conflict nor the supposed economic classes ever existed.

Furthermore it would most certainly lead to wholesale attacks of a similar kind on countless hundreds of other judgments all over America, arousing quiescent

animosities to an extent which no one can now predict. To hold, on the grounds advanced by petitioner, that there is a substantial question as to the constitutional validity of the judgment below is to cast much greater doubt upon the laws and judgments of a great many American states the statutes of which actually prescribe property-owning and tax-paying qualifications for jury service much broader in exclusionary effect than the alleged Virginia practice of which petitioner complains.

By these proceedings petitioner claims the right to introduce evidence, offered for the first time in *habeas corpus* proceedings after an adverse verdict at his trial, to show an alleged practice of excluding from juries persons who have failed (as petitioner claims he has done) to pay annual poll taxes of one dollar and fifty cents. If such a contention commands the attention of this Court the way is surely open for an endless succession of like attacks and spurious crusades against the laws and judgments of such states as New York, where ownership of property is a legal prerequisite to eligibility for jury service[1], or Michigan, where only persons prosperous enough to be taxable may serve[2], or Indiana and Tennessee, where jurors must be "freeholders or householders"[3], or the numerous states where eligibility

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[1]Judiciary Law of New York, 502; 65 Consol. Laws (McKinney) §§1695c11, 1695d5, 1695e10, 1695f19, 1695g6. (Husbands or wives of persons possessing the required amount of property are eligible to serve.)

[2]Jurors are taken exclusively from assessment rolls, which do not include the names of "persons who, in the opinion of the supervisor and the board of review, by reason of poverty, are unable to contribute to the public revenue," the property of such persons being exempt from taxation. Compiled Laws of Michigan (1929) §§13723, 3412, 3395.

[3]Ann. Indiana Statutes (Burns 1933) §4-3317; Tennessee Code (Williams 1934) §10006.

for jury service depends on actual payment of taxes[4]. The harmful effect of implying a doubt as to the fundamental fairness of all such judgments is wholly incalculable.

THE FACTS

The testimony of the witnesses is reviewed at length in the opinion of the Supreme Court of Appeals of Virginia, *Waller* v. *Commonwealth,* 178 Va. 294, 313, 16 S. E. (2d) 808, and is summed up as follows:

> "* * * Here we have a case where an accused, after making threats against the life of his intended victim, proceeds to arm himself with a shotgun and pistol, goes to the home of his victim and, without any provocation, executes his previous threats by shooting his unarmed victim four times, twice in the back, as he walked away from him, and twice as he lay upon the ground. It is hard to conceive of a case where the elements of premeditation and malice stand out more prominently than they do in the case at bar.
>
> "In our opinion, the accused has had a fair and impartial trial, by an impartial jury; he has been convicted upon evidence adduced by members of his own race, which upon its face bears the impress of truth."

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[4] *E.g.,* North Carolina (North Carolina Code Ann. [Michie 1939] §2312), and the states where only qualified electors are eligible for jury service and prepayment of poll taxes is a qualification for voting. Digest of Arkansas Statutes (Pope 1937) §8291, Constitution of Arkansas, Amendment 8; Code of Mississippi (1930) §2029, Constitution of Mississippi, Art. XXII §241; Constitution of South Carolina, Art. V §22, Art. II §4.

It may be added that though the accused offered as his only reason for shooting deceased that deceased "usually carried a gun and run his hand in his pocket like he was trying to pull out something," other witnesses testified that deceased did not own a pistol (Record of trial, Mrs. Davis, p. 98; Frank Davis, p. 102; Edgar Davis, p. 106). The evidence also shows that at the time he was shot the deceased did not wear a coat, which would have been necessary to conceal a pistol in his pants pocket. (*Id.* p. 99.) And although petitioner stated that when he fired deceased "run a bit," nevertheless, he admittedly shot four times. Medical testimony definitely established that two bullets entered the decedent's back (*Id.* p. 95). As to the other two, the surgeon could not be sure, but from the other evidence, including defendant's own testimony, the conclusion is inescapable that all four shots were fired from behind. It is not too much to say that the accused offered no substantial or credible defense at his trial, and on his own testimony no proper verdict other than first-degree murder could have been found.

After a judgment of conviction had been entered and affirmed petitioner commenced *habeas corpus* proceedings in which he offered, for the first time, to introduce evidence on the question whether persons who had failed to pay capitation taxes had been systematically excluded from juries in the county of venue. These proceedings resulted in the judgment complained of.

SUMMARY OF ARGUMENT

No substantial Federal question, not previously decided by this Court, is presented:

> Even if the facts alleged in the petition for *habeas corpus* constituted a prohibited discrimination, the existence of such facts cannot be brought in issue for the first time and inquired into in *habeas corpus* proceedings. *Andrews* v. *Swartz,* 156 U. S. 272; *Wood* v. *Brush,* 140 U. S. 278.
>
> The alleged Virginia practices in selecting jurors, even if they had actually existed, would not discriminate against a class or race of persons to which petitioner belongs. *Franklin* v. *South Carolina,* 218 U. S. 161. See *Strauder* v. *West Virginia,* 100 U. S. 303, 310.

ARGUMENT

I.

PETITIONER'S CONTENTION, MADE FOR THE FIRST TIME ON APPLICATION FOR *HABEAS CORPUS*, CANNOT BE INQUIRED INTO IN SUCH PROCEEDINGS.

The judgment of which petitioner complains is one denying an application for writ of *habeas corpus,* by which he sought to have the Supreme Court of Appeals review alleged errors at his trial.

It is not claimed that petitioner was not represented ably at his trial by astute and diligent counsel. On the contrary, the record shows that his attorneys were

extremely alert to take advantage of every possible technicality. They challenged the grand jury on the ground that the statute permitted only qualified voters, who had paid poll taxes for the three preceding years to serve, and that the grand jury had been drawn from a list composed of such persons, when as a matter of fact the record (p. 21) shows that the grand jury was a special one, not drawn from any list, but selected by the judge. (The court construed the statute as requiring no such qualification and overruled the motion, stating to counsel, "I selected the jury myself. I don't know whether they are qualified [to vote] or not," and, as stated in the petition for certiorari, one member of the grand jury was not so qualified and had paid no poll taxes for three years.)

At his trial petitioner made no offer to prove the facts as to poll tax payment, and admitted there had been no systematic exclusion of Negroes from juries in the trial court. (*Id.* p. 60.) Nor did the petitioner make any tender of proof with respect to the voting qualifications of persons composing the petit jury list. He contended that the law required voting qualifications and assumed that it had been complied with. The Supreme Court of Appeals of Virginia has made it clear that his contention as to the law was unfounded. *Waller* v. *Commonwealth, supra.*

Petitioner either properly raised the constitutional question of the composition of the jury in the trial court, or he failed to do so. If the question was properly raised, the Viginia Supreme Court of Appeals held it to be without merit, and that judgment was subject to review by this Court. But *habeas corpus* cannot be

invoked as a substitute for such a review. If petitioner failed to properly present the constitutional question in the State courts, he cannot now raise it by petition for a writ of *habeas corpus*. Not only are these principles well established by the decisions of this Court, but their application is essential to the orderly administration of justice. If an accused were permitted to go to trial without raising questions of this or similar kinds, taking his chances before the jury first selected, and later challenge in *habeas corpus* proceedings the method of selecting the jury, there would be no end of criminal proceedings. The courts would be swamped with innumerable such petitions based on every conceivable ground.

It is settled beyond question that alleged errors in trial of a case cannot be reviewed in *habeas corpus* proceedings unless they are such as to deprive the court of jurisdiction to render a valid judgment of conviction, and that errors such as petitioner alleges occurred with respect to the selection of jurors do not have that effect. In the case of *Wood* v. *Brush,* 140 U. S. 278, a writ of *habeas corpus* was sought on the ground that Negroes were systematically and intentionally excluded from the jury in the New York trial court. The accused explained that his failure to raise the question at the time of the trial was due to his ignorance of such practice, the existence of which he discovered only after final judgment, but this Court held that it is not within the scope of *habeas corpus* proceedings to inquire whether such errors have occurred at the trial. Said the Court:

> "* * * Whether the grand jurors who found the indictment, and the petit jurors who tried

the appellant, were or were not selected in conformity with the laws of New York—which laws, we have seen, are not obnoxious to the objection that they discriminate against citizens of the African race because of their race—was a question which the trial court was entirely competent to decide, and its determination could not be reviewed by the circuit court of the United States upon a writ of *habeas corpus* without making that writ serve the purposes of a writ of error. * * *" (140 U. S. at 285-6.)

The Court further said:

"* * * If the question of the exclusion of citizens of the African race from the lists of grand and petit jurors had been made during the trial in the court of general sessions, and erroneously decided against the appellant, such error in decision would not have made the judgment of conviction void, or his detention under it illegal. *Savin, Petitioner,* 131 U. S. 267, 279; *Stevens* v. *Fuller,* 136 U. S. 468, 478. Nor would that error, of itself, have authorized the circuit court of the United States, upon writ of habeas corpus, to review the decision or disturb the custody of the accused by the state authorities. The remedy, in such case, for the accused, was to sue out a writ of error from this court to the highest court of the State having cognizance of the matters, whose judgment, if adverse to him in respect to any right, privilege or immunity, specially claimed under the Constitution or laws

> of the United States, could have been re-examined, and reversed, affirmed or modified by this court as the law required. Rev. Stat. section 709." (*Id.*, at 287.)

A later decision, on all fours with the case at bar, is the case of *Andrews* v. *Swartz*, 156 U. S. 272, in which the accused at the trial made the express objection that persons of African descent were purposely excluded from the grand and petit juries in a New Jersey State Court. He contended further that "the state court denied him the right to establish that fact by competent proof," a contention not even made here. In disposing of the argument that the judgment was void and within the reach of *habeas corpus*, Mr. Justice Harlan said:

> "* * * Even if it be assumed that the state court improperly denied to the accused, after he had been arraigned and pleaded not guilty, the right to show by proof that persons of his race were arbitrarily excluded by the sheriff from the panel of grand or petit jurors solely because of their race, it would not follow that the court lost jurisdiction of the case within the meaning of the well established rule that a prisoner under conviction and sentence of another court will not be discharged on habeas corpus unless the court that passed the sentence was so far without jurisdiction that its proceedings must be regarded as void. *Ex parte Siebold*, 100 U. S. 375; *Wood* v. *Brush*, 140 U. S. 287; *Jugiro* v. *Brush*, 140 U. S. 297; *Pepke* v. *Cronan*, ante 84. When a state court has entered upon the trial of a criminal

> case, under a statute not repugnant to the Constitution of the United States, and has jurisdiction of the offense and of the accused, no mere error in the conduct of the trial should be made the basis of jurisdiction in a court of the United States to review the proceedings upon writ of habeas corpus." (156 U. S. at 276.)

Petitioner argues, however, that the decision in *Johnson* v. *Zerbst,* 304 U. S. 458, has overruled the principles laid down in the above cited and in numerous other decisions of this Court. But the *Johnson* case recognizes the fundamental principle that *habeas corpus* is an available remedy only where the judgment attacked is a *void* one. Mr. Justice Black states in his opinion that "A judge of the United States—to whom a petition for habeas corpus is addressed—should be alert to examine the facts for himself when if true as alleged they make the trial *absolutely void.*" (Italics supplied.) The opinion further holds that a Federal Court is without "jurisdiction to proceed to judgment and conviction" of an accused who is not represented by counsel, unless the accused intelligently *waives* his right to counsel. In the absence of jurisdiction, the judgment is of course *absolutely void.*

Certainly petitioner can find nothing in the case of *Johnson* v. *Zerbst, supra,* or elsewhere to abrogate the fundamental principle that objections to the selection of grand or petit jurors are waived unless seasonably made; that an accused fully represented by counsel of his own choice, may not withhold his objections to a jury until he learns their verdict and then demand another.

Petitioner made timely objection to the indictment and *venire facias* on the grounds that Virginia statutes required jury lists to be composed of qualified voters, but wholly failed, until after verdict and judgment against him, to raise the factual question of alleged discriminatory practices on the part of jury commissioners by adducing evidence in support of his allegations, without which evidence such a question surely cannot be raised. *Martin* v. *Texas*, 200 U. S. 316; *Brownfield* v. *South Carolina*, 189 U. S. 426; *Torrance* v. *Florida*, 188 U. S. 519; *Smith* v. *Mississippi*, 162 U. S. 592.

Furthermore, another factual question concerning which petitioner offered no proof is the question whether payment of a poll tax of one dollar and fifty cents draws such a line of cleavage between the residents of Pittsylvania County, Virginia, as that the selection of jurors from a list of poll tax payers would amount to a class discrimination. Petitioner claims the population may thus be divided into two economic classes—those who can afford to pay the tax and those who cannot. But is this by any means true? This question goes to the very heart of petitioner's contention. It is almost inconceivable that any considerable number of persons possessing the requisite health, intelligence, and other qualifications to serve on juries, in civil as well as criminal cases, are prevented by their economic condition from paying an annual tax of one dollar and fifty cents. Certainly no court would take judicial notice that such a condition exists, and this Court has expressly held that the burden is on the accused to support any such allegation by proof. In the case of *Franklin* v. *South Carolina*, 218 U. S. 161, the State Constitution required the payment six months

before an election of all poll taxes then due and payable in order for a person to be eligible to vote. The eligibility of grand jurors was limited to electors. Franklin contended that since this operated to exclude from the grand jury persons who had not paid their poll taxes, it operated to exclude persons of the Negro race. But this Court refused to draw any such factual inference. On the contrary, the opinion of Mr. Justice Day states:

> "* * * In this class of cases, when the real objection is that a grand jury is so made up as to exclude persons of the race of the accused from serving in that capacity, it is essential to aver and prove such facts as establish the contention." (218 U. S. at 167.)

It is apparent, therefore, that petitioner clearly waived any objections he might have had—objections which in no event go to the jurisdiction of the court—to the selection of jurors in his case by failing to raise the same before verdict was rendered, and hence such objections are not available to him in *habeas corpus* proceedings.

In this connection it is contended by petitioner that while Federal Courts will not thus interefere by *habeas corpus* with judgments of State Courts, this petition for *certiorari* is to review the action of the Supreme Court of Appeals of Virginia in refusing a writ of *habeas corpus*, and that the question is whether under the law of Virginia the constitutional rights of pettiioner were violated by refusal to grant the writ. The law of Virginia with respect to the use of *habeas corpus* to correct mere errors in the trial of a criminal case, or to permit

a convicted person to raise questions which he should have raised at the trial, but did not, or to permit him to prove facts which he could have proved, but did not prove in the trial court, is the same as that laid down by the decisions of this Court. It is thus stated in Ex parte *Rollins,* 80 Va. 314, 316:

> "It is a well-established and undisputed principle that mere errors in the proceedings of a court of competent jurisdiction cannot be reviewed on *habeas corpus.* In such case the remedy, if any, is by writ of error or appeal. But where the proceedings under which the party complaining is detained in custody are void, as where the court is without jurisdiction, the same are reviewable on *habeas corpus,* and the party will be discharged."

Thus *habeas corpus* clearly will not lie in the case at bar.

II.

PETITIONER'S ALLEGATIONS DO NOT SHOW A DISCRIMINATION AGAINST A RACE OR CLASS OF PERSONS TO WHICH PETITIONER BELONGS.

In the *habeas corpus* proceedings below, as well as at his trial, petitioner offered nothing more than a highly dubious conclusion of his counsel to show that exclusion of persons who had not actually paid their poll taxes would operate to discriminate against any particular race or economic class of persons, or even that he himself belongs to any such class.

Assuming that economic *ability* to pay a tax of one dollar and fifty cents is an acceptable standard to distinguish one economic class from another, it certainly does not follow that the actual payment or non-payment of the tax substantially reflects this distinction. It is a matter of common knowledge, for instance, that great numbers of prosperous people do not pay their poll taxes (payment being unenforceable by legal process within three years after they are due), while many of our poorest citizens do. Petitioner has nowhere made or offered to make any showing in support of his very doubtful assumption that to classify the population according to actual payment of poll taxes even approximates a classification according to economic *ability* to pay them, and this case falls squarely within the rule laid down by this Court in *Franklin* v. *South Carolina, supra.*

Likewise, petitioner makes no showing of his own economic inability to pay the tax. On the contrary, even if there were an economic class of our citizens, including "share croppers," physically and mentally competent to serve on juries but unable to pay a poll tax of one dollar and fifty cents, it affirmatively appears that petitioner was not one of them. His own testimony shows that he was employed in Maryland at the time of the homicide, and happened to be in Pittsylvania County, Virginia, only because he had come there for the week-end to celebrate his birthday (Record of trial, p. 118.) It also appears that he had completed a three-year high school education (*Id.*, p. 116), and owned such luxuries as a shotgun and pistol (*Id.*, p. 122).

Hence he was clearly not within the alleged economic class which he claims was discriminated against.

Finally, it should be observed that petitioner's contentions presuppose that all of the laws in other States which make ownership of property or payment of taxes essential to eligibility for jury service are flagrantly unconstitutional, and his counsel simply ignore this Court's opinion in *Strauder* v. *West Virginia,* 100 U. S. 103, where it is expressly pointed out that a State "may confine the selection [of jurors] to males, *to freeholders* to citizens" etc. (100 U. S. at 310. Italics supplied.)

Constitutionality of Requiring Poll Tax Payment as Prerequisite to Voting Not Involved.

Petitioner seeks to inject into this case a question as to the constitutionality of Virginia election law requirements that all poll taxes due for the three years preceding an election must be personally paid as a prerequisite to the right to vote. His objection to such requirements is based on his contention that the poll tax provides a means of distinguishing one economic class from another.

It should be observed that poll taxes are assessed, entirely independently of the election laws, against all residents of the State, including aliens, persons domiciled elsewhere but temporarily residing in Virginia, those who fail to register or are unable by reason of illiteracy to do so, and those who are disfranchised by conviction of felony. (See Tax Code § 22, p. xvii of appendix to petitioner's brief.) If there were any question as to the

constitutionality of requiring prepayment of the tax as a condition of suffrage, there would still be none as to the validity of the tax itself.

It is obvious, therefore, that the validity or invalidity of such election law requirements cannot be brought in issue here, since the tax to which petitioner objects must stand in any event.

CONCLUSION

We most earnestly submit that the petition for writ of certiorari presents no substantial Federal question and that the writ should be denied.

Respectfully submitted,

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